STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of C. R, Minor.

UNPUBLISHED
May 29, 2014

No. 318021
Livingston Circuit Court
Family Division
LC No. 2012-014029-NA

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to his minor child, CR. We affirm.

I. BACKGROUND

Respondent and mother met in 2010 while respondent was on parole for a 2005 conviction for second degree criminal sexual conduct, involving a minor under the age of 13, MCL 750.520C(1)(a). A condition of respondent's parole was that he have no contact with children. Mother, who had four minor children, became pregnant during respondent's parole term and CR was born on July 14, 2011. Respondent and mother began living together after the expiration of his parole. Respondent was charged and convicted of a parole violation for failing to register his new address. Additionally he was charged but acquitted for accosting a minor.

On February 1, 2012, petitioner, Department of Human Services, filed a petition requesting the trial court take jurisdiction over CR as well as mother's other children. The petition alleged that the mother had a previous history with Children's Protective Services and was then exposing her children to a convicted sex offender (the respondent). Respondent's child, CR, was placed with petitioner and mother's other children were released to their biological father on February 2, 2012. Respondent was present for this hearing. A continued preliminary hearing was held on February 9, 2012, and an amended petition, which added allegations that respondent engaged inappropriately with two of mother's daughters, was authorized.

A pretrial hearing was held on March 1, 2012. Respondent was present for this hearing by way of jail transport from the Livingston County Jail where he was incarcerated on charges of accosting a minor. No admissions were made to the petition allegations. A trial date was scheduled to challenge the petition requesting jurisdiction. An adjudication hearing was held on March 26, 2012, where mother pled to allegations in the petition granting the court jurisdiction

of the children. Respondent was present for the hearing although still incarcerated. Respondent made no admissions and still wished to challenge the petition.

Respondent, although incarcerated, attended both days of the jurisdiction trial which was held on May 21st and June 15, 2012. On June 15, 2012, the court found it had jurisdiction under MCL 712A.2 as to CR. CR was placed with his paternal grandparents and remained with them throughout these proceedings. The grandparents repeatedly noted that they did not desire to adopt CR. Respondent's dispositional hearing was held on July 11, 2012. As of that time there was no written order for a plan of services for respondent and DHS acknowledged that it had not prepared one. The court announced a plan of services orally at the hearing but noted that the plan was to be held in abeyance due to respondent's incarceration. The trial court plan required the respondent to maintain weekly contact with petitioner and attend all court hearings; participate in and follow all recommendations of a psychological evaluation; participate in a sex offender risk assessment with John Neumann; participate in treatment for perpetrators of child sexual abuse; abstain from using drugs or alcohol; participate in a substance abuse assessment and any recommended substance abuse counseling. Petitioner presented respondent with a treatment plan, which he signed, on August 15, 2012, at the second dispositional hearing. This plan generally mirrored the court plan with the addition of details regarding substance abuse assessment treatment and testing, participation and benefit from Alcoholics Anonymous Celebrate Recovery program while incarcerated and upon release; parenting classes and an intake assessment at Community Mental Health to determine whether he would qualify for services. Additionally, he was ordered to participate in an assessment with John Neumann at Impact Counseling Services to address his sexual offending issues. The court ordered that petitioner arrange for and fund a sex offender risk assessment with John Neumann for respondent. The court also ordered that petitioner was not required to pay for any other services and only required the incarcerated respondent to maintain monthly contact with petitioner.

At the November 14, 2012, dispositional review hearing respondent was still in jail awaiting trial on his accosting offense. The trial court was in receipt of an Impact Consulting report from John Neumann regarding respondent and also learned that respondent was still participating in the Alcoholics Anonymous Celebrate Recovery program in jail. On January 30, 2013, the trial court ordered petitioner to file a permanent custody petition as to respondent and mother. The court stressed that neither parent was in a position to have the children returned to them at this time.

On March 22, 2013, the court held a dispositional review and pretrial hearing on the amended petition for permanent custody. The court was made aware that respondent was found not guilty of accosting a minor. The amended petition requested termination for both mother and respondent. The petition sought termination against respondent under MCL 712A.19b(3)(b)(i), (c)(i), (g), (j), and (n)(i).

A termination hearing began on May 21, 2013. Respondent was present, but was incarcerated this time for failing to register as a sex offender. The court heard testimony from John Neumann, a therapist and the director of Impact Consulting Services who completed the evaluation and risk assessment for respondent. Neumann indicated there were a number of red flags that caused him to evaluate respondent overall as a high risk re-offender, including respondent's history of sexual abuse, substance abuse, and respondent's previous CSC II

conviction. Neumann warned that although respondent did not indicate an attraction to young boys, his living with a young child was unsafe. Further, that the relationship to the child would not matter because respondent was not fully in control of his impulses and thought processes. Ultimately, Neumann was of the opinion that even if respondent completed sex offender treatment, he was not safe around children and the child's gender probably would not matter.

Respondent testified that he was incarcerated from March 20, 2012 until March 20, 2013 and he moved in with mother upon his 2013 release. Respondent indicated that he had developed treatment goals and relapse prevention plans and continued to see John Schaefer for individual therapy. Respondent said Neumann recommended sex offender treatment and respondent was participating in that. Respondent also indicated that he was sober and planned to remain sober and that all the drug screens he completed were negative and he had been cocaine free for eight years. Respondent said he was not sexually attracted to children and has never been attracted to male children. Respondent also indicated that petitioner did not pay for any services, did nothing to reunify him with CR and did not witness any parenting time between himself and CR.

DHS worker Kelly indicated that respondent refused to share with petitioner what services he was engaged in when there was a family planning meeting in May 2013. Kelly was unaware of whether respondent had completed substance abuse treatment because respondent did not provide any documentation of participation. Kelly opined that respondent could not provide proper care or custody for CR, who was two years old, and had been in care for over one year. Kelly also indicated that DHS does not pay for services for convicted sex offenders, but DHS did pay for the drug screens and Neumann's assessment.

In a written opinion, the trial court determined that petitioner had provided clear and convincing evidence to establish termination of respondent's parental rights under MCL 712A.19b(3)(c)(i), (3)(g), (3)(j), and (3)(n). The trial court also determined that termination was in CR's best interests.

II. STANDARD OF REVIEW

A trial court's factual findings and the ultimate finding that the grounds for termination have been proven by clear and convincing evidence is reviewed for clear error. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citations omitted). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Additionally, the trial court's application and interpretation of court rules and statutes is reviewed de novo. *In re Mason*, 486 Mich at 152.

III. REASONABLE EFFORTS

First, respondent argues that petitioner failed to make reasonable efforts to reunify the family. Respondent argues that petitioner did not offer respondent any services and respondent could have benefited from services and been reunified with CR. We disagree.

"Reasonable efforts to reunify the child and family must be made in all cases" except in cases involving aggravated circumstances. MCL 712A.19a(2). The state is still obligated to fulfill its duties even when a parent is incarcerated. *In re Mason*, 486 Mich at 152. The state must afford an incarcerated parent the opportunity to participate in child protection proceedings. *Id.* at 169. Respondent received and participated in all services that were available to him while he was incarcerated. The trial court's finding in regards to reasonable efforts for reunification was that:

> [P]etitioner attempted to provide referrals to reunification services for Father, funded through alternative means, but Father failed to provide the department with the means to monitor and document his participation in the available services in which he claimed he was participating. The services offered to Father were designed to provide assistance in overcoming the barriers which brought the child into care and could have facilitated reunification. A failure to engage in and document benefit from available services on respondent's part does not constitute a failure to provide services on petitioner's part.

The trial court's determination that petitioner made reasonable efforts to reunify was not clearly erroneous. *In re Mason*, 486 Mich at 152. He had access to Celebrate Recovery, regarding his substance abuse issues but continued to consume alcohol. He asserted that he was receiving services form Catholic Services and Dr. Schaffer but did not provide any documentation or sign any releases. Respondent's argument that his circumstances are similar to those of the terminated father in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), is unavailing. Where the father in *Mason* was given no services while incarcerated, respondent had access to services. While the service plan in *Mason* was vague and unsigned, respondent's plan was delivered to him orally and in writing and was detailed. Unlike the father in *Mason* this respondent was an active physically present participant in these proceedings who chose to decline to sign releases or provide documentation. The trial court properly determined that petitioner had met its obligation in making reasonable efforts to reunify respondent and CR.

IV. STATUTORY GROUNDS FOR TERMINATION

Next, respondent argues that there was not clear and convincing evidence to establish any statutory grounds for termination. We disagree.

A trial court may terminate a parent's parental rights if it finds that at least one of the statutory grounds in MCL 712A.19b(3) has been proven by clear and convincing evidence, *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000), and that termination is in the best interests of the child, *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). Petitioner sought termination under MCL 712A.19b(3)(b)(i) (parent's act caused physical injury or physical or sexual abuse and reasonable likelihood child will suffer harm in future if returned to parent), (3)(c)(i) (conditions that led to adjudication still exist), (3)(g) (failure to provide proper care and custody), (3)(j) (child likely to suffer harm if returned home), (3)(n)(i) (parent is

convicted of criminal sexual conduct), and (3)(n)(ii) (parent is convicted of a violation of criminal statute which has an element of force or threat of force and parent is subject to sentencing as a habitual offender). The trial court found that only MCL 712A.19b(3)(c)(*i*), (3)(g), (3)(j), and (3)(n) were proven by clear and convincing evidence.

MCL 712A.19b(3)(c)(*i*) provides that termination is justified if 182 days or more have elapsed and the conditions that led to adjudication still exist with no reasonable likelihood that they will be resolved within a reasonable time. Here, the trial court determined that given respondent's "lack of meaningful and consistent progress with services over a period of several years, it is highly unlikely that [respondent] would be capable of providing proper care within a reasonable time period."

Respondent argues that the conditions that lead to adjudication were his past CSC II conviction and his prior substance abuse which he claims have been addressed. Respondent testified that he attended group therapy while incarcerated for the 2004 CSC II conviction and that he was in individual sex offender treatment. He denied that being around minor children was a trigger and maintained that his trigger was cocaine. Respondent also indicated that he was sober and planned on staying that way.

What respondent fails to address is the trial court's reasoning concerning why the conditions still existed. Although the trial court did say respondent's issues were the prior CSC II conviction and respondent's substance abuse, the trial court also noted that the conditions still existed because of respondent's failure to make any real or meaningful progress on those issues. The Court however, found that the respondent continued to have substance abuse issues and was a high risk to re-offend sexually. The court found the testimony of Dr. Neumann persuasive regarding the potential for re-offending. Dr. Neumann testified that whatever previous treatment respondent had received had not been internalized because respondent was not in command of his impulses and thought processes. Additionally, the court received testimony that the respondent interacted with minors during his parole period in violation of the conditions of parole and that after release from parole he was engaged in grooming behaviors with the daughters of CR's mother. Respondent's substance abuse issues also remained active despite participation in AA, NA and Celebrate Recovery. He continued to drink alcohol as soon as his parole had ended. It was respondent's contention that he could drink and not re-offend because neither young people nor alcohol were triggers for him. The court credited Neumann's opinion that alcohol use increased the probability of re-offending. Based on the evidence presented, the trial court did not clearly err in determining that the conditions that led to adjudication still existed.

Only one ground for termination must be proven by clear and convincing evidence. *In re Powers*, 244 Mich App at 117. As discussed above, there was clear and convincing evidence establishing MCL 712A.19b(3)(c)(*i*) as a ground for termination. However, the trial court also properly determined that MCL 712A.19b(3)(g) was established by clear and convincing evidence. MCL 712A.19b(3)(g) provides that termination is justified when the parent fails to provide proper care for the child and there is no reasonable expectation of the parent providing proper care within a reasonable time. See *In re VanDalen*, 293 Mich App 120, 138-139; 809 NW2d 412 (2011).

A parent's compliance or failure to comply with the parent-agency agreement is evidence of the parent's ability to provide proper care and custody for a child, *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), but compliance with the parent-agency agreement is not sufficient alone to demonstrate proper care and custody, the parent must also benefit from services. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005), superseded in part on other grounds by statute as stated in *In re Hansen*, 285 Mich App 158; 774 NW2d 698 (2009). Here, the trial court determined that not only did respondent fail to comply with services, but he also did not benefit from services.

Once again, respondent did not provide any documentation to petitioner that he was engaged in services. Furthermore, as evidenced by the testimony from the experts, respondent still had issues with impulsivity and his thought processes. Neumann indicated that respondent was not internalizing any treatment that respondent may have been engaged in. Additionally, as the trial court eloquently summarized:

> . . . as of June 20, 2013, [respondent] testified that he understood his "trigger" to include alcohol and narcotic use; however, later cocaine was the sole "trigger" for his sex offending behavior. [Respondent] testified on June 20, 2013 that the department referred substance abuse service but that he was somehow ineligible. [Respondent] reported that "they won't let me go no more 'cause I haven't drunk in over a year so I'm not an alcoholic no more." [Respondent], however, tested positive for alcohol on June 6, 2013. Referring to his drinking alcohol in early 2012, [respondent] reported that "just 'cause you had a couple drinks" and then were sober for a year, "you ain't no alcoholic no more." [Respondent] fails to recognize that his year of "sobriety" was the year that he was incarcerated in the county jail.

Respondent's argument against termination under MCL 712A.19b(3)(g) is that CR's placement with respondent's parents constituted proper care and custody by respondent. However, what respondent fails to acknowledge is that, even if respondent's parents provide proper care and custody for CR, respondent has not demonstrated an ability to do so. Respondent's parents had not expressed an intent to adopt CR, nor was there a long-term plan of guardianship suggested. Outside of terminating respondent's parental rights, CR's future and stability was unplanned and would languish. Respondent had not demonstrated a benefit from services and did not demonstrate that he was internalizing the changes necessary to properly care for CR. Furthermore, respondent's lack of progress was consistent from his time on parole that ended in 2012 until the termination hearing in 2013. Based on the little to no progress respondent made in the time the case was pending, it was unlikely that respondent would be able to provide proper care and custody within a reasonable time. The trial court did not err in determining there was sufficient evidence to establish MCL 712A.19b(3)(g) as a ground for termination.

Termination under MCL 712A.19b(3)(j) is justified when there is a reasonable likelihood that the child will be harmed if returned to the parent. As the trial court pointed out, much of the evidence supporting termination under MCL 712A.19b(3)(g) grounds also supports termination under (3)(j) grounds. Although there was no evidence that CR had ever been harmed, respondent's failure to internalize years of treatment posed a serious risk to CR. Even if

respondent was not attracted to male children, respondent's impulsiveness and pedophilic behaviors were a risk. CR would be at risk for emotional harm if returned to an environment in which respondent participated in grooming behaviors. The trial court did not err in finding this ground was established as well.

Respondent erroneously likens himself to the father in *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009). He contends that the trial court erred when it presumed that he would be a danger to CR in the future based on his prior conduct as a convicted sex offender. A significant difference between respondent's case and *Rood* however is that in *Rood* "[i]t was undisputed that respondent had never been accused of harming a child," *Id*. at 117, while respondent here had both accusations and a conviction against him. His relationship with the mother began while he was on parole for a CSC II violation involving an eleven-year-old child. MCL 712A.19b(3)(n) provides that termination is appropriate if:

> The parent is convicted of 1 or more of the following and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:
>
> (*i*) A violation of section . . . 520c, . . . of the Michigan penal code . . . .

In order to terminate parental rights under MCL 712A.19b(3)(n)(i), the petitioner must establish by clear and convincing evidence that respondent (1) was convicted of one of the listed offenses and (2) termination was in CR's best interests because "continuing the parent-child relationship with [respondent] would be harmful . . . ." Here it is undisputed that respondent was convicted of CSC II, which is MCL 750.520c. Instead, respondent's argument focuses on his belief that he is not a danger to CR.

The trial court determined that continuing the parent-child relationship would be harmful to CR because respondent "does not internalize that his 'grooming' and pedophilic behaviors have any significance." Furthermore, the trial court found Neumann's testimony credible because the trial court said, "Given the expert's opinion that no child, irrespective to gender, would be safe in his care unless directly supervised, this Court finds by clear and convincing evidence that continuing the parent-child relationship would be harmful to his child." The trial court's finding was not clearly erroneous. As discussed above, there was evidence that respondent was classified as a high-risk re-offender. Furthermore, Neumann opined that respondent was a risk to any child regardless of age or gender. Although there was no evidence that respondent had harmed CR or any of respondent's other children in the past, respondent's lack of progress with his issues demonstrates a high risk of future harm to CR. Therefore, there was sufficient evidence to support termination based on MCL 712A.19b(3)(n).

V. BEST INTERESTS

Finally, respondent argues that termination was not in CR's best interests and, therefore, the trial court erred in determining otherwise. We disagree.

If the trial court determines that at least one statutory ground for termination exists by clear and convincing evidence, then it must next find by a preponderance of the evidence that termination is in the best interests of the children in order to terminate parental rights. MCL

712A.19b(5); *In re Moss*, 301 Mich App at 83. We review the trial court's best interests' determination for clear error. *In re Moss, supra*, at 90. The trial court may consider the child's needs for permanency, stability, and finality when making the best-interest determination. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). The trial court may also consider the bond between the child and the parent, the parent's ability to parent, and any advantages of a foster home over the parent's home. *Id.* Placement of a child with relatives generally weighs against termination, *In re Mason*, 486 Mich at 164, but does not automatically outweigh termination. *In re Mays*, 490 Mich 993, 996-997; 807 NW2d 307 (2012). The trial court does not have to automatically consider placement with a relative. *Id.* at 996.

> Rather, what is required is a case-by-case determination in accordance with the law . . . . While placement with a relative may in many instances constitute a relevant consideration in the "best interest" determination, the failure to consider it in a particular case does not necessarily preclude the court from determining that termination is in the children's "best interests." The primary beneficiary of the "best interest" determination is the child . . . and when the children's best interests are clearly served by the termination of rights, the fact that they are then living with a relative does not in every instance undermine that determination. [*Id.* at 996-997.]

A "trial court has a duty to decide the best interest of each child individually." *In re Olive/Metts*, 297 Mich App at 42 (citation omitted). As to CR, the trial court determined that, although for the most part respondent demonstrated appropriate parenting skills, his "continued problems with drugs and alcohol as well as criminal offenses and related consequences demonstrate[d] that [respondent] [could] not provide a safe and drug-free home for any of the children" which included CR. The trial court determined that CR needed stability and permanency, which respondent could not provide.

Based on the evidence presented, and as discussed at length above, the trial court's determination was not erroneous because respondent did not demonstrate he had the ability to provide a safe home for CR. CR was born in July 2011 and entered foster in care in February 2012 at six months old. CR remained in foster care for over a year before the trial court ordered petitioner to file for permanent custody. Respondent remained incarcerated for the majority of this time. Most of CR's young life was spent in the care of someone other than respondent because respondent could not demonstrate the ability to properly deal with his issues. CR's interests in having a safe, stable, and permanent home outweighed any bond or benefit from relative placement.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter